

ORIGINAL

Supreme Court No. 85422-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,
Respondent,

v.

PHIENGCHAI SISOUVANH SYNHAVONG
Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
ARGUMENT	13
CONCLUSION	22
APPENDIX A	23
(Findings on Order of Competency)	

TABLE OF AUTHORITIES

WASHINGTON CASES

<i>State v. Benn,</i> 120 Wn.2d 631, 845 P.2d 289 (1993)	17
<i>State v. Heddrick,</i> 166 Wn.2d 898, 215 P.3d 201 (2009)	19, 21
<i>State v. Lewis,</i> 141 Wn. App. 367, 166 P.3d 786 (2007)	18, 19
<i>State v. Lord,</i> 117 Wn.2d 829, 822 P.2d 177 (1991)	17
<i>State v. Ortiz,</i> 104 Wn.2d 479, 706 P.3d 1069 (1985)	17

WASHINGTON STATUTES

RCW 10.77	13
RCW 10.77.060	13, 16, 22
RCW 10.77.065	21

STATEMENT OF THE CASE

On June 27, 2008, the defendant saw Aracali Camacho Gomez and her two children waiting at a bus stop. The defendant offered them a ride. Araceli's son, Juan Campos, translated for them. (RP¹ 455).

During the ride, the defendant asked about Araceli's pregnancy. Araceli said that she was eight and a half months pregnant with a boy. The defendant replied that she was also pregnant, but with a girl. The defendant offered to give Araceli boy baby clothes she had bought before she found out she was expecting a girl. Araceli then gave the defendant her address and phone number. (RP 454-57).

Earlier in 2008, the defendant had told her family that she was pregnant. (RP 549). She had also bought items for a baby such as baby clothes, a stroller, and a car seat that were found in her residence. (RP 734, 738).

Later on June 27th, the defendant drove back to Araceli's Pasco neighborhood. She called Araceli's phone number from a pay phone and asked Alfredo Covarrubias to interpret. During that phone call, Araceli walked out of her house with her phone in her hand and waved at the defendant. (RP 465, 467).

During that time, Araceli's husband, Juan Gomez, went to the store with their two children. When they returned, Araceli was gone. The phone handset was also missing. (RP 473).

The defendant drove Araceli onto Highway 395 and pulled onto a turnout where she first stabbed Araceli.

The defendant then drove off Highway 395 to Columbia Park trail where she parked in a dark area by some bushes. (RP 439, 446). The defendant then tied an unconscious Araceli with yarn and cut the baby out of Araceli.

¹ "RP" refers to the trial Verbatim Report of Proceedings. All other transcripts will be referred to by date.

The defendant put Araceli's body halfway into the bushes. (RP 439). The defendant then drove out of the park into the City of Kennewick. She called 911 and said she was giving birth to a baby and needed help. (RP 493). She parked her car, got into the back seat with Araceli's baby and pulled her pants off and panties down. (RP 508).

The defendant and Araceli's baby were taken to the Kennewick General Hospital where the defendant continued to claim that the baby was her baby. (RP 601). However, Dr. Victor Brooks examined and tested the defendant and determined that she had not given birth. The defendant eventually told Dr. Brooks that she had cut the baby out of another woman's womb. (RP 607).

Dr. Brooks then told Officer Ryan Kelly of the conversation. When Kelly came back into the exam room, the defendant spontaneously said, "I know you have to read me my rights." (RP 551).

The defendant then described the events of her picking Araceli up, stabbing her, and later cutting the baby out of the womb. (RP 551-61). At the end of that conversation, the defendant discussed an unrelated murder and asked how much time the defendant got. (RP 565).

Officer Kelly searched the defendant's purse. He found a baby bottle, suction bulb, mechanics gloves, and a razor-blade knife. (RP 572, 574, 576).

The defendant was next interviewed by Detective Wes Gardner and other detectives. The detectives then corroborated the defendant's statement with extrinsic evidence. This included:

- 1) the location of the pay phone that the defendant said she used to call Araceli, as well as the phone number she called; (RP 706-07)

- 2) finding a blood spot at the turnout described by the defendant as where she first stabbed Araceli; (RP 789)
- 3) finding yarn on Araceli at the crime scene consistent with the description of how she bound Araceli with yarn; and (RP 797, 798)
- 4) finding Araceli's phone in the bushes by Araceli's body in the area where the defendant said she threw the phone. (RP 685).

Dr. Daniel Selove performed an autopsy. He found numerous stab wounds that would cause enough bleeding to first cause loss of consciousness, and then death. (RP 767). He also found different wounds that opened the womb to give access to the uterus and taking the baby out of Araceli. (RP 771). Dr. Selove believed that this wound would have occurred after Araceli lost consciousness. (RP 770).

The defendant was charged with Aggravated Murder in the First Degree. (CP 1-2).

Dr. Richard Adler started working with the defense on August 13, 2008. He was the lead evaluator among seven or eight people working on the mitigation investigation done for the defendant while she was facing the death penalty.

Dr. Adler consulted extensively with Dr. Van Leng, a Lao-speaking clinical psychologist. (RP 03/24/10, 173-79).

Dr. Leng interviewed the defendant and did psychological testing on her on September 25, 2008. Dr. Adler interviewed the defendant on December 4, 2008. Dr. Leng wrote an 18-page report on December 31, 2008. Dr. Adler reviewed that report, did additional consultation with Dr. Leng in January 2009, and reviewed the work of the other members of the defense team before writing a February 2009 report.

Neither Dr. Adler nor Dr. Leng raised any issues concerning the defendant's competency in

their reports that addressed whether the defendant should face the death penalty.

Dr. Adler later testified that if he had any concerns about the defendant's competency to stand trial while she was facing the possibility of the death penalty that he could have brought it up with defense counsel. (RP 347).

Dr. Phil Barnard, a clinical psychologist with the defense team, evaluated the defendant for competency in the summer of 2009 and concluded that she was competent to stand trial. (RP 356).

On October 20, 2009, defense counsel presented an order that the defendant be evaluated for competency to stand trial. (CP 12-17).

Eastern State Hospital designated Dr. Randall Strandquist to evaluate the defendant while she was in her inpatient stay at Eastern State Hospital.

At the competency hearing, Dr. Strandquist described the procedure in evaluating the defendant's competency. The procedure included a psychiatric intake by Dr. Sam Pateras, a psychosocial social intake by a social worker on the team, group therapy, psychological testing administered by others on the team, and Dr. Strandquist's forensic interviews of the defendant. (RP 10-12, 24-25).

Dr. Strandquist also testified as to the importance of staff observation of the defendant during her inpatient stay and gave two examples.

The January 3, 2010, RN weekly summary noted the defendant's delusions such as carrying a rolled-up blanket like a baby, but also noted that these reports only lasted two to three days. The observation note continued, "These said reports have appeared to staff only when patient is in a formal type of meeting with doctors or other staff. Patient has been clear in thought

and speech and able to make needs known." (RP 24, 25).

The report also noted that the defendant told a staff person that if she were found not guilty by reason of insanity, she would be at Eastern State Hospital for a number of years and then released. (RP 149). Dr. Strandquist later testified that this was an external incentive for using a false symptom not only because of the possibility of an earlier release, but the attraction of doing time at Eastern Hospital instead of prison. (RP 158).

These observations were consistent with Dr. Strandquist's ultimate conclusion that the defendant was malingering, and that she had the capacity to understand court proceedings and has the capacity to assist in her own defense. (RP 37).

On March 24, 2010, the defense called Dr. Richard Adler. He testified that the defendant was not competent to stand trial.

However, Dr. Adler had not interviewed the defendant since December 2008, which was two months before he wrote his report that did not mention any concerns with the defendant's competency. (RP 04/08/10, 346; Ex. F). The only testing done after Dr. Adler's initial report and before the competency hearing was by Dr. Barnard in the summer of 2009, and Dr. Barnard found the defendant competent to stand trial. (RP 04/08/10, 356). Dr. Adler apparently did do some additional testing on March 23, 2010, the night before his direct examination in the competency hearing.

At the conclusion of the hearing, Judge Swisher found that based on the totality of the evidence that the defendant did not meet the burden of proving incompetence. (RP 465).

Judge Swisher based part of his findings on his observations of the defendant's demeanor during the three days of hearings. (RP 469, 470). It was also based on the defendant's interactions

at Eastern State Hospital and the lack of any stated concern about the defendant's competency after she had been interviewed by Dr. Adler, Dr. Leng, Dr. Barnard, and Dr. Mays until Dr. Adler's concern in March 2010. (RP 465, 473).

The court noted that the defendant contended that she was incompetent in part because of the defendant's lack of ability to remember conversations from a few days earlier.

The court found that was contradicted by the defense expert's reliance on the defendant's memory of her life in preparation of the mitigation report. This included her memory of abuse, of an incident in a swimming pool, of being hit by her mother, her memory of foster care, and her reaction to loss of close family members. (CP 153; Appendix A-finding #14).

The court also found in finding number 15:

That contention was also contradicted by the defense reliance on the defendant's memory and her statements during the competency process. These included:

a. The defendant's memory and characterization of Dr. Strandquist's clinical interview, which Dan Arnold participated in by telephone and whose declaration corroborated the defendant's memory.

b. The defendant's memory and characterization of the demeanor of Dr. Barnard's staff in administering the TOMM test compared to the demeanor of Dr. Adler's staff in administering the TOMM test.

c. On March 23, 2010, the defendant was talking to Dr. Adler about the PAI test she took at Eastern State Hospital more than two (2) months earlier, and was able to exactly recall the first question on the PAI test.

(CP 153).

Finally, the court noted that when it was giving its decision, the defendant was crying in reaction to the competency ruling. (CP 154; RP 473).

The case then proceeded to trial on the issue of insanity. The defendant was convicted of Aggravated Murder in the First Degree. (CP 246-47).

ARGUMENT

The defendant argues that due process was violated because Dr. Strandquist was not a "qualified expert or professional person" as set forth in RCW 10.77.060. The defendant concedes that "qualified" is not defined in RCW 10.77. (Defendant's brief at 17).

However, the statutory language is helpful. RCW 10.77.060 provides that the court either appoint or request the secretary to designate a qualified expert or professional person to examine and report upon the mental condition of the defendant.

Here, the court requested the secretary to designate. The secretary designated Dr. Randall Strandquist. The defendant is essentially arguing that the secretary and Eastern State Hospital failed the statutory duty to designate a qualified expert or professional person.

The defendant argues that only redundancy would allow a psychologist to be qualified under

the statute merely by being a licensed psychologist. (Defendant's brief at 21).

However, Dr. Strandquist has many qualifications to perform competency evaluations in addition to his being a licensed psychologist. Indeed, there are many licensed psychologists who would not have Dr. Strandquist's qualifications in terms of education, experience, and peer review to perform competency evaluations.

Dr. Strandquist did an internship at Terminal Island Prison and another internship at Federal Medical Center where he learned how to do forensic evaluations. (RP 03/12/10, 6). Of course, most licensed psychologists would not have that training and internship.

Dr. Stranquist followed his specialized training and education for conducting forensic evaluations with five years experience at Eastern State Hospital doing evaluations for courts pursuant to orders for forensic evaluations such as competency determination.

Not only is that five years experience something that most licensed psychologists do not have, but it also involves peer review and interaction with other team members working on a forensic evaluation.

Dr. Strandquist also demonstrated an awareness of the literature and legal issues in forensic evaluations. This included his testimony about Dr. Phil Resnick's work, as well as his answers in a very prepared and professional cross-examination. (RP 03/12/10, 34). He was cross-examined about DSM's reference to legal issues, about the legal effect of an insanity acquittal, familiarity with the work of Dr. Richard Rogers, and the legal standards for competency determination. (RP 03/12/10, 34, 50, 52, 69, 147-79).

These are all qualifications relating to forensic exams that Dr. Strandquist has that many, if not most, licensed psychologist would not have. The logical interpretation of RCW

10.77.060 is that it requires an expert or professional person who is qualified to do forensic exams.

Indeed, the defendant does not argue that Dr. Strandquist is not qualified to do forensic or competency evaluations. Instead, she argues that Dr. Strandquist is not qualified because he did not have the cultural competence to perform an evaluation of the defendant.

However, the defendant offers no authority for adding language requiring cultural competence to the language of RCW 10.77.060.

The issue of cultural competence may be appropriate for cross-examination, as was skillfully done by defense counsel in the present case. Another use of cultural competence would be presentation of cultural evidence, as was also done in this case by Dr. Adler and his consultations with Dr. Leng.

The proper use of cultural competence as weight of evidence, as opposed to eliminating the

admissibility of evidence, is shown by the facts of the present case. Here, the defendant moved to the United States when she was five. She spoke English, attended regular Kennewick schools, was involved in school activities, and worked in different jobs that had no reference to her ethnicity or culture.

The defendant's argument should also be viewed in the context of the law for competency determinations. Generally, a trial court's decision to conduct a competency hearing is reviewed for abuse of discretion. *State v. Lord*, 117 Wn.2d 829, 901, 822 P.2d 177 (1991).

The trial court has wide discretion in judging the mental competency of a defendant to stand trial, and its decision will not be reversed absent an abuse of discretion. *State v. Ortiz*, 104 Wn.2d 479, 706 P.3d 1069 (1985).

A criminal defendant may be required to prove his incompetence. *State v. Benn*, 120 Wn.2d 631, 666, 845 P.2d 289 (1993). Therefore, the

trial court's finding in the present case that the burden was on the defendant to prove her incompetence was appropriate.

A helpful case is *State v. Lewis*, 141 Wn. App. 367, 166 P.3d 786 (2007). There, the trial court ordered a competency evaluation and no one advised the trial court of any concerns that Lewis had any developmental disabilities. Lewis was found incompetent and committed to an additional 90-day commitment. *Id.* at 382. During that time, Dr. Hart found that Lewis did not suffer from a developmental disability. This was based on Dr. Hart's assessment on Lewis's estimated IQ, his behavior on the hospital ward, and the lack of any reference to a developmental disability in Lewis's medical and school records. *Id.* Lewis challenged that finding on appeal, arguing that Hart was not a disability expert.

The Court of Appeals rejected the defense argument and affirmed the trial court's finding that the defendant was competent to stand trial.

The Court noted that the defendant did not explain how a finding of developmental disability, even if warranted, would have affected the trial court's decision finding him competent to stand trial. *Id.* at 383.

Similarly, in the present case, the defendant does not show how the requirement of a culturally competent expert would have affected the court's decision, as the trial court had the benefit of Dr. Adler's testimony who had consulted with Dr. Leng.

The defendant also argues that it was error not to file Dr. Strandquist's report and cites to *State v. Heddrick*, 166 Wn.2d 898, 215 P.3d 201 (2009).

State v. Heddrick is easily distinguished from the present case. There, the report by Western State Hospital was not filed and a hearing was never held. Instead, the court relied on defense counsel's stipulation as to the defense expert's (Dr. White) opinion that the

defendant was competent. Dr. White also never memorialized his findings into a report. *Id.* at 904. The Court found the defendant's waiver of competency issue based on no reports violated due process.

In the present case, there was a contested hearing with testimony from both Dr. Strandquist and Dr. Adler. Also, there was no waiver by the defendant in the present case; the trial court ruled against her.

Also, in the present case it is clear that the court had Dr. Strandquist's report, as during the hearing the prosecutor asked the court if it had a copy of the report, and the court answered it did have the copy. (RP 03/12/10, 36).

Dr. Strandquist also had the report and read from it in response to an objection from defense counsel that he quote from his report and his chart. (RP 03/12/10, 24).

Defense counsel also had the report, as he cross-examined Dr. Stradquist about it.

This procedure meets the requirement of RCW 10.77.065, which requires that the facility conducting the evaluation shall provide its report and recommendation to the court and that it also shall provide a copy to the prosecutor and defense attorney. It does not require that the report be filed.

Also, while defense counsel correctly noted that the court stated, "On these facts alone, it would seem that Heddrick did not receive due process under law." *State v. Heddrick*, 166 Wn.2d 904.

However, *State v. Heddrick* actually held that the defendant had waived the due process argument. *Id.* at 909. The defendant argues in a footnote to his brief that her case can be distinguished because she did not make such a waiver.

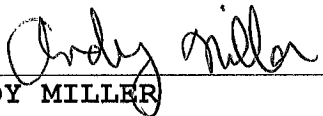
That argument falls on the issue of filing the report. While the defendant never waived her right to a competency evaluation, she did waive

any potential error as to the formal filing of the report, as she never made any objection nor made any attempt to file the report.

CONCLUSION

Dr. Randall Strandquist was a qualified expert and professional person when he evaluated the defendant for competency under RCW 10.77.060. The trial court was within its discretion when it found that the defendant did not prove that she was incompetent. Therefore, the Judgment and Sentence should be affirmed.

RESPECTFULLY SUBMITTED this 20th day of September 2011.


ANDY MILLER
Benton County Prosecutor
Bar No. 10817
OFC ID NO. 91004

APPENDIX A

NO. 08-1-00685-2

**FINDINGS ON ORDER
OF COMPETENCY**

JOSIE DELVIN
BENTON COUNTY CLERK

APR 20 2010

FILED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF BENTON

STATE OF WASHINGTON,

Plaintiff,

vs.

PHIENGCHAI SISOUVANH
SYNHAVONG,

Defendant.

NO. 08-1-00685-2

FINDINGS ON ORDER OF
COMPETENCY

THIS MATTER was heard on February 19, March 12, ^{March 24} and April 8, 2010, to determine whether the defendant was competent to stand trial. The defendant was committed to *Eastern State Hospital* for an evaluation regarding her competency to stand trial. The Court considered the report by Dr. Randall Strandquist and his testimony as well as testimony by Dr. Richard Adler and Exhibits and reports admitted at hearing.

The Court finds that on the totality of evidence, the defendant has not met the burden of proving that she is incompetent to stand trial. This is based on the following:

1. When the defendant first arrived at Eastern State Hospital, she exhibited bizarre behavior such as walking around with a blanket and saying, "That's my baby."

2. Eastern State Hospital staff observed that when the defendant was unaware that they could overhear her, she exhibited no delusional content in her speech.

1 3. That behavior ended after two (2) to three (3) days after another peer confronted
2 her.

3 4. The defendant was social and had appropriate interaction with her peers, played
4 cards and kept score, laughed and told jokes, and had bright affect with them.

5 5. The defendant discussed legal issues with her peers, such as concept of proof
6 needed for a criminal charge and the difference in legal consequences if she was found insane.

7 6. When the defendant was interviewed by staff, she had no problem discussing her
8 personal and social history but when staff guided conversation towards court proceedings, she
9 would immediately slip into a delusional mode.

10 7. Eastern State Hospital administered a number of tests to the defendant, and Dr.
11 Randall Strandquist found that the tests showed that the defendant was malingering.

12 8. Dr. Phil Barnard, a psychologist retained by the defense, tested the defendant in
13 2009 before the motion for incompetency, and he found, at that time, that the defendant was
14 malingering.

15 9. Dr. Richard Adler explained that the defendant's delusional episodes at Eastern
16 State Hospital were related to the defendant's mental condition, specifically, the delusional
17 disorder aggravated by the stress of the situation. However, the Court finds that the delusional
18 episodes were situational and that the defendant controls the situations when they come and go.

19 10. Dr. Adler opined that the defendant suffered from PTSD and that was consistent
20 with the defendant's self-reported drug usage.

21 11. There was no corroboration of the defendant's self-reported drug use, such as any
22 toxicology reports, high school records showing drug problems, and criminal history of drug
23
24
25

1 use, and possibility of drug usage is contradicted by the defendant's passing of a nurse
2 certification test.

3 12. A written report submitted to the Court about high incidence of PTSD in refugees
4 from Southeast Asia also found that such refugees have a low incidence of drug addiction.

5 13. The defendant contended that the defendant was not competent at least in part on
6 the defendant's lack of ability to remember conversations from a few days earlier.

7 14. That contention was contradicted by the defense expert's reliance on the
8 defendant's memory of her life in preparation of the mitigation report. This included her
9 memory of being sexually abused, of an incident in a swimming pool, of being hit by her mother
10 leading to a hospital visit, her memory of her foster care, and her reaction to loss of close family
11 members.
12

13 15. That contention was also contradicted by the defense reliance on the defendant's
14 memory and her statements during the competency process. These included:

15 a. The defendant's memory and characterization of Dr. Strandquist's clinical
16 interview, which Dan Arnold participated in by telephone and whose declaration
17 corroborated the defendant's memory.

18 b. The defendant's memory and characterization of the demeanor of Dr.
19 Barnard's staff in administering the TOMM test compared to the demeanor of Dr.
20 Adler's staff in administering the TOMM test.

21 c. On March 23, 2010, the defendant was talking to Dr. Adler about the PAI
22 test she took at Eastern State Hospital more than two (2) months earlier, and was able to
23 exactly recall the first question on the PAI test.

24 16. The Court's observations of the defendant during the three (3) days of testimony,
25 with one exception, was that the defendant was attentive, appeared to be tracking with the
hearing, and appropriately interacted and talked with Mr. Arnold.

1 17. During one recess, the defendant was in the courtroom when Mr. Iaria informed
2 Mr. Miller that Mr. Arnold might miss a brief part of the hearing when it resumed and that it
3 was okay with the defendant, and the defendant announced, "That it was fine with her."

4 18. Mr. Arnold's affidavit outlining concerns about problems communicating with
5 the defendant noted problems with the defendant from the beginning. However, Dr. Adler filed
6 a 36-page report in February 2009, which detailed her mental condition, and there was no issue
7 of competency mentioned in the report.

8 19. Dr. Adler used his earlier tests, his February 2009 medical diagnosis of the
9 defendant and the affidavit of Dan Arnold as a good part of his opinion that the defendant was
10 incompetent, but when he had those facts in February 2009, he did not raise the issue at all.

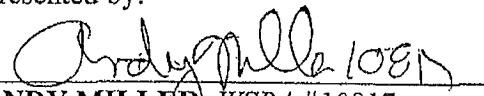
11 20. These findings, which are the basis of the court's decision that the defendant is
12 competent to stand trial, is corroborated by the defendant's demeanor during the reading of the
13 decision. There were visible tears, use of a Kleenex by the defendant and audible crying, all of
14 which are in contrast to the defendant's demeanor during the three (3) days of testimony.

15 **IT IS HEREBY ORDERED** that the defendant is competent to stand trial.

16 **DATED** this 20th day of April, 2010.

17
18 
19 **JUDGE ROBERT G. SWISHER**

20 Presented by:

21 
22 **ANDY MILLER**, WSBA #10817
23 *Prosecuting Attorney*
24 OFC ID 91004

Approved for entry:

25 **MICHAEL P. IARIA**, WSBA #15312
Attorney for Defendant

DANIEL M. ARNOLD, WSBA #10575
Attorney for Defendant

CERTIFICATE OF SERVICE

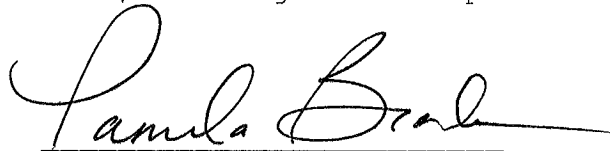
I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of Brief of Respondent as follows:

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Signed at Kennewick, Washington on September
20, 2011.



Pamela Bradshaw
Legal Assistant